

ROBERT FROMER

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Co-Chairmen and Members
Judiciary Committee
Room 2100, Legislative Office Building
Hartford, CT 06106

Re: S.B. No. 280. An Act Revising the Penalty for Capital Felonies.

Dear Co-Chairmen and Committee Members:

My name is Robert Fromer, and I am neither testifying for nor against replacing the death penalty with a penalty of life imprisonment without the possibility of release for certain murders committed on or after the effective date of this act.

My testimony recommends that the Judiciary Committee and Legislature consider making it harder to impose the ultimate penalty by requiring prosecutors to prove the criminal defendant's guilt with "absolute certainty" rather than the lesser standard of "beyond a reasonable doubt."

We have all heard the phrase: "Beyond a Reasonable Doubt."¹ Anyone who has served on an American jury or even watched a police drama on television is familiar with this concept under which a criminal defendant may be found guilty only if the prosecution meets this legal standard of proof.

In "The Origins of Reasonable Doubt," author James Whitman, a lawyer and historian, upends our common thoughts about the "reasonable doubt" standard by taking readers on a historical journey to its origins. Strikingly, Whitman locates those origins before the very birth of modern law - in Christian moral theology. The demand to prove guilt beyond a "reasonable doubt," was arguably driven originally by the goal not to protect the legal rights of defendants, but rather to assuage the powerful moral anxieties of jurors in convicting an innocent person.

First, there is no point in trying to be faithful to the original intent of a phrase like reasonable doubt because the phrase has no original drafter. Not only does the phrase not appear in the United States and Connecticut constitutions, it was never crafted by anybody in particular. It emerged in a process of collective European rehashing of the precepts of

¹ Whitman James Q., *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*, Yale University Press, New Haven, Connecticut

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Christian moral theology that date back to Pope Gregory I (c. 540 - 12 March 604), and beyond. It was created not only by English jurists but also by English moralist and by Italian and Spanish and French moralists and lawyers as well. There is no original intent to interpret.

Reasonable doubt as a standard of proof means that a defendant could theoretically be convicted and sentenced to death on purely circumstantial evidence in the absence of bodily proof. Eye witness accounts have a spotty history, at best. In the modern era of forensic science and technology such definitive proof is necessary and sufficient to establish guilt. In the Cheshire cases, the prosecution could prove that both Joshua Komisarjevsky and Steven Hayes committed capitol murder with absolute certainty.

To prove that a defendant is criminally liable for murder under such a new standard, the first element for proving the crime would be proof that a homicide was committed on a custodial body. Means, motive and opportunity would serve as the second, third, and fourth elements of proof. The fifth element would require that forensic evidence definitively prove that the defendant committed the crime as charged. This last element would require independent verification by a certified third party. However, verification of the forensic evidence provides the quality assurance critical to the proof. The "absolute certainty" standard would apply to all elements.

Only if prepared to meet the burden of proving "absolute certainty" would a prosecutor present a death-penalty case to the jury. Otherwise the charge would be murder, with life imprisonment based on the traditional standard of "beyond a reasonable doubt."



Robert Fromer